IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1888

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
a Foreign Corporation,
Appellant,

vs.

JOSEPH and BARBARA J. FALZON,
Individually and as Next Friend of
JOSEPH D. FALZON, STEVEN FALZON,
RODNEY FALZON and RAMON FALZON, minors
Appellees.

ON APPEAL FROM THE SUPREME COURT OF MICHIGAN

APPELLANT'S REPLY BRIEF OPPOSING APPELLEE'S MOTION TO DISMISS OR AFFIRM

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INTRODUCTION

This Reply Brief is filed pursuant to Rule 16.5 of the Rules of the Supreme Court of the United States. No attempt will be made to address each of the arguments made by Appellees in their Brief in Support of a Motion to Affirm or Dismiss. Rather, the purpose of this Reply is to clarify and re-assert Appellant's arguments as to those issues which Appellant respectfully submits are the key issues to be considered in determining whether or not this Court, by appeal or certiorari, should

take jurisdiction of the constitutional and treaty issue questions raised by Appellant. To the end of speaking to the questions presented in the matter at bar — those issues generated by the rulings of the Michigan Courts rather than those conceived by Appellees — a review of the relevant Michigan proceedings is necessary.

On March 4, 1982, the Michigan Trial Judge filed, pursuant to Michigan General Court Rule 806.3, a Certified Concise Statement of Facts and Proceedings (Appendix 8a-23a). Rule 806.3(1)(a)(ii) reads in pertinent part:

> (ii) In all interlocutory matters. That the trial judge has certified that *the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, or if it is shown by the appellant that the matter is either of major significance to the jurisprudence of the state or that the decision is clearly erroneous and appellant would suffer substantial harm by awaiting final judgment before taking appeal.* (Emphasis added).

Among the questions certified for immediate appeal were (Appendix 22a):

> 1. Whether a Michigan Circuit Court Judge that has undisputed jurisdiction over the parties and subject matter can order defendant's (VWAG) employees or its former employees to submit to depositions in Germany, under oath and in accordance with Michigan Practice and Procedure (GCR 304.2) and Notes Verbales of 1955?
>
> 2. And whether or not the taking of such discovery depositions would violate the Hague Treaty (28 USC §1781), or is obtaining of such information and disclosures confined to Letters Rogatory?

Upon appeal, the Michigan Court of Appeals affirmatively refused to act (Appendix 3a). On February 22, 1983, the Michigan Supreme Court also refused to consider the questions raised under the Treaty between the United States and The

Federal Republic of Germany (Appendix 2a). Thereafter the Trial Judge, recognizing "the Michigan Supreme Court's decision to dispose of the case by refusing to grant leave to appeal," denied Appellant's Motion for Stay of Depositions of "eleven (11) German nationals" (Appendix 6a-7a).

> NOW, THEREFORE, IT IS ORDERED that the Motion for Stay filed by Defendant VOLKSWAGEN AKTIENGESELLSCHAFT with regard to the March 28, 1983, notice scheduling the depositions of eleven (11) German nationals to begin in the Federal Republic of Germany on May 2, 1983, all pursuant to this Court's earlier Orders of October 7, 1980 and August 17, 1982 be and the same is hereby denied.
>
> CHARLES S. FARMER
> Circuit Court Judge

The seminal Order of October 7, 1980, (Appendix 24a-25a), which still controls the parties at the trial level, says: (emphasis not in original)

> *IT IS HEREBY ORDERED that in view of this Court's desire for the Michigan General Court Rules control of these proceedings as much as possible,* that the plaintiffs schedule the *depositions of the following individuals,* represented by plaintiffs to be employees *in Germany* of defendant VWAG, at a time mutually convenient for both plaintiffs' and defendant's counsel:
>
> * * * *
>
> *IT IS FURTHER ORDERED* that *deponents shall answer all questions promulgated,* and that counsel for the defendants shall have the right to place objections to said questions on the record, that *the transcript shall be placed under seal and filed pending resolution of all such objections by the Court,* that only counsel for the parties shall view *said transcript* pending such resolution, that the contents of *said depositions* and of said *transcript* shall remain confidential to only counsel for the parties;
>
> * * * *
>
> *IT IS FURTHER ORDERED that this issue is of major significance to the jurisprudence of this state and*

raises a serious question involving a conflict between the law of this state and of the United States, that this Order involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal therefrom may materially advance the ultimate termination of the litigation, and that defendant VWAG may suffer substantial harm by awaiting final judgment before taking appeal.

/s/ _____
CHARLES S. FARMER
Circuit Judge

The following emphasized portions of the August 17, 1982, Order (Appendix 7a-8a) are equally instructive as to the insistence of the Michigan Courts of the primacy of Michigan Court Rules — even in Germany. (But for the Stay Orders of Chief Justice Burger and Justice O'Connor this August 17th Order would, as well, be in full force and effect as a final order).

Aug. 17, 1982
ORDER REQUIRING DISCOVERY

Upon the plaintiffs' motion for default, and the defendant having responded, and the Court being fully advised in the premises.

IT IS HEREBY ORDERED that defendant Volkswagen A.G. *produce for depositions in Wolfsburg, Germany,* all employees as identified in this Court's order of October 7, 1980, *for deposition* on or before August 30, 1982, at a location to be mutually agreed upon *in Wolfsburg, Germany.*

IT IS FURTHER ORDERED that unless this order is complied with, or unless this order is stayed or otherwise modified, *failure to produce said employees* by August 30, 1982, date shall subject defendant Volkswagen A.G. to appropriate sanctions as will be determined by this Court.

Nowhere in any order of the Michigan Courts is any reference made to "consular questioning" (first suggested by Appellees in their Brief filed with this Court) or other proceedings remotely resembling those mandated by the Treaty. *Every-*

where, the procedures ordered to be followed by American attorneys in Germany reference "depositions," "produce for deposition," "failure to produce for depositions," "deponents shall answer," "transcript," and "objections." The most cursory reading of the Hague Convention (Appendix 34a-52a) and, indeed, of The Notes Verbales (Appendix 61a-71a) as well as the statement of the German Ambassador (Appendix 72a-74a) leave no question but that the Order of the Michigan Courts is an anathema to the Treaty and to the obligations to which the United States is constitutionally bound.

I.

THE REFUSAL OF THE MICHIGAN SUPREME COURT TO REVERSE THE ORDER OF THE MICHIGAN TRIAL COURT ORDERING DEPOSITIONS TO BE TAKEN IN GERMANY IN VIOLATION OF TREATY RIGHTS AND OBLIGATIONS IS A FINAL ORDER.

In their Brief in Support of their Motion to Dismiss or Affirm, Appellees argue that the Orders of the Michigan Trial and Appellate Courts do not have sufficient indicia of finality under *Cox Broadcasting Corp.* v *Cohn*, 420 US 469 (1975) and *Cohen* v *Beneficial Industrial Loan Corp.*, 337 US 541 (1949) since these Orders are mere Discovery Orders which may prove to have little consequence to the final judgment and, in any event, are still subject to further review and refinement in the Trial Court. The record, however, demonstrates that Appellees are, at best, being disingenuous in their characterization of the Orders.

First, the Trial Court, as indicated above, has certified that this Appeal involves a controlling issue of law "of major significance" and that it should be decided in advance of and apart from the state law issues in the case (Appendix 25a).

Second, by certifying the question, the Trial Court Judge has already indicated that his Order will not be revisited or revised in the course of further trial court proceedings. In

simple terms, it is the final decision of the Trial Court on the German depositions.

Third, as indicated by the "Order Requiring Discovery" of August 17, 1982, (App. 7a) should Appellant not produce employees or former employees for deposition, the Trial Court will impose sanctions. This Order clearly indicates that there is no additional clarification or refinement to be explored in the Trial Court.

Fourth, as indicated by the "Order Denying Defendant's Motion to Stay the Taking of Certain Depositions" dated April 15, 1983, all appellate avenues have been exhausted and absent relief in the United States Supreme Court, the Trial Court is requiring that the depositions be taken as originally ordered.

When this Court took jurisdiction in *Cox Broadcasting Corp.* v *Cohn*, 420 US 469 (1975) the matter had not come to trial. Nevertheless, this Court held that the Georgia ruling was final under 28 USC §1257(2) and said at 420 US 485:

> Delaying final decision of the First Amendment claim until after trial will "leave unanswered . . . an important question of freedom of the press under the First Amendment," "an uneasy and unsettled posture [that] could only further harm the operation of a free press."

In this case the obligations of the United States under a treaty are about to be breached by virtue of an order of a Michigan trial court judge and the refusal of the Michigan Supreme Court to reverse that order. If that order is not reviewed, this Court will "leave unanswered" an important question of constitutional and international law and will further leave the question of how the United States adheres to its treaty obligations in this area in an "uneasy and unsettled posture". Even more compelling considerations than those which prompted this Court to take jurisdiction in *Cox, supra*, are present here.

Similarly, under the "collateral order" exception to finality (as developed with respect to 28 USC §1291) discussed by Appellees at Page 11 of their brief, the treaty issue raised by

Appellant meets the test for immediate review as reiterated in *Cohen* v *Beneficial Industrial Loan Corp.*, 337 US 541, 546 (1949): ". . .too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

The product liability action under state law currently pending between the parties in this matter is so totally divorced from the constitutional, international law and treaty questions raised by the subject discovery orders as to make it inappropriate to link the resolution of both questions in one proceeding or to force a delay in the resolution of the treaty issue until such time that a trial is completed on the separate product liability matter. Further, since a genuine question of violating another nation's sovereignty is present, this matter rises to a level where more than delay of a litigant's rights are involved. If the depositions are allowed to go forward, and if it is later determined by this Court, or the United States State Department, or the Foreign Office of the Federal Republic of Germany, that treaty rights and obligations have been breached there will be a *fait accompli* that cannot be rectified by later judicial review.

II.
THIS MATTER IS PROPERLY BEFORE THIS COURT AS AN APPEAL, BUT IF NOT, THE QUESTION PRESENTED IS SO SUBSTANTIAL THAT IT SHOULD BE REVIEWED BY CERTIORARI.

Appellant has denominated this petition for review by this Court as an appeal on the strength of the holdings of this Court in *Japan Lines Ltd.* v *County of Los Angeles*, 441 US 434 (1979) and *Cohen* v *California*, 403 US 15 (1971).

In this case, the Michigan General Court Rules governing depositions were squarely challenged on the grounds that, *as applied*, they abrogated a treaty. The trial court judge in his Certified Concise Statement of Facts and Proceedings (Ap-

pendix 8a-22a) characterized Appellant's challenge to his order as follows(Appendix 13a):

> That the procedure advocated by plaintiffs-appellees was in direct contravention of the Hague Convention on Taking Evidence Abroad; the codification of that Treaty in 28 USC §1781; the United States Constitution Article VI, Section 2 . . .

Further, the trial judge stated particular questions for review as set forth in the Introduction, *supra* at 2.

It is clear that the court rules, as applied, were challenged on constitutional and treaty grounds. It is likewise established that with respect to the language of 28 USC §1257(2) state court rules are deemed to be "statutes". *In Re Griffiths,* 413 US 717 (1973).

In any event, this Court, pursuant to 28 USC §2103, may treat the Jurisdictional Statement as a petition for a Writ of Certiorari. Appellant at Page 18 Note 9 of the Jurisdictional Statement has requested such relief, if the Court deems it appropriate; that request is again herein renewed.

III.

THE NOTES VERBALES DO NOT PROVIDE A PROCEDURE FOR TAKING DEPOSITIONS IN CONTRAVENTION OF THE HAGUE CONVENTION.

Appellees suggest that the Notes Verbales provide an alternate acceptable method for the taking of depositions apart from the Hague Convention. Such is simply not the case. (The argument also overreaches the appropriate limits to a brief at this stage since the positions advanced go to the merits of the dispute, and, in so doing, demonstrate the need for further briefing and a full hearing on the merits.)

The plain language of the Notes Verbales indicate (Appendix 70a):

> (1) that no compulsion is brought to bear on the person to be questioned to make him appear or provide information, more specifically,
>
> (a) that the request to provide information is not

called a "summons" and that the questioning is not called "interrogation";

(b) that no coercive measures are threatened in the event that a person does not appear or refuses to provide information;

(c) that no compulsion whatsoever is brought to bear on a person ready to provide information to make him sign protocols or other records of orally provided information.

The above-described procedure is certainly not a deposition. It is also clear from the Notes that American consuls in the Federal Republic, and not American lawyers are the persons who are authorized to do the questioning (Appendix 64a).

When read in context with the Hague Treaty reservations by the Federal Republic of Germany in which the Federal Republic states that "taking of evidence by diplomatic officers and consular agents is not permissible in its territory if Germany nationals are involved" (Appendix 50a), it is apparent that the questioning authorized by the Notes Verbales is not a formal "taking of evidence" or a deposition.

The position of the German government as set forth by its Ambassador in the letter quoted in the Jurisdictional Statement (Appendix 72a-74a) is also instructive as to the German government's view of the Notes Verbales. Appellees cannot dismiss this letter as easily as they would like. It was accepted for filing by the Michigan Supreme Court and is properly a part of this record. Even if it were not a part of the record, this Court could take judicial notice of it pursuant to Rule 44.1 of the Federal Rules of Civil Procedure. Similarly, under Michigan law, it could be judicially noticed under Rule 202 of the Michigan Rules of Evidence.

Finally, Appellant would note that Appellees cannot avoid the contradiction inherent in the trial court's order. If the Notes Verbales are to control, then no compulsion may be issued and no sanctions can be imposed either directly or indirectly to compel attendance or require responses to question-

ing. If this is the reading which Appellees would adopt (which, assuredly, they do not) then no depositions will be taken and the order is meaningless. On the other hand if Appellant will be subject to sanctions for failure of its employees to appear — as indicated by the trial court to be the case in its order of August 17, 1982 (Appendix 7a) — then the purely voluntary procedures of the Notes Verbales are inapplicable. Case authority further establishes that when compulsion of any kind is used, whether direct or indirect, to gather evidence abroad, the Hague Treaty procedure is the only acceptable procedure. *FTC* v *Compagnie De Saint- Gobain-Pont-A-Mousson*, 636 F2d 1300 (D.C. Cir. 1980).

RELIEF

For the reasons stated above and in the previously filed Jurisdictional Statement, Appellant requests that this Court note probable jurisdiction.

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